IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 23, 2008 Session

STATE OF TENNESSEE v. JOHN JASON BURDA

Direct Appeal from the Circuit Court for Dickson County
No. CR7595 Robert E. Burch, Judge

No. M2006-02523-CCA-R3-CD - Filed May 4, 2009

Following a jury trial, Defendant, John Jason Burda, was convicted of one count of solicitation of a minor and twenty-one counts of especially aggravated sexual exploitation of a minor. After conducting a sentencing hearing, the trial court sentenced Defendant to an effective sentence of twenty-two years to be served incarcerated. The trial court merged Counts 3, 4, 13, 14, 17, 18, and 20 with Count 2, Counts 8, 10, 15, 16, 21, 23, and 24 with Count 7, and Count 11 with Count 12. Counts 9, 19, and 22 were left as individual convictions. On appeal, Defendant argues (1) the trial court erred in failing to grant the motion to suppress the evidence seized from Defendant's home; (2) that the evidence was insufficient to sustain his convictions; (3) that the trial court erred in not requiring that all the counts of aggravated sexual exploitation of a minor be construed as one offense; (4) that the victim's testimony was not adequately corroborated; (5) that the trial court erred in refusing to grant the Defendant's motion to dismiss the indictments; and (6) that the law and facts do not support the sentence. After a thorough review of the record, we affirm the judgment of the criminal court as to the suppression motion, the corroboration of the victim's testimony, the sufficiency, and merger issues. We reverse and remand as to sentencing for entry of corrected judgments.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Circuit Court Affirmed, Reversed and Remanded

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

R. Todd Hansrote, Clarksville, Tennessee, for the appellant, John Jason Burda.

Robert E. Cooper, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Joseph Baugh, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

Defendant was convicted of one count of solicitation of a minor and twenty-one counts of especially aggravated sexual exploitation of a minor. Defendant and the victim communicated via the internet for a period of approximately two years. The charges at issue, however, concern only the time period of July 1, 2004 through September 30, 2004. During this time the victim took pictures of herself and sent them over the internet to Defendant. The pictures consisted of the victim in various states of undress and depicted the victim masturbating.

On September 20, 2004, Sergeant Roger Jackson of the King Police Department in King, North Carolina contacted the North Carolina State Bureau of Investigation for assistance in a case involving an adult male in Tennessee (later determined to be Defendant) and a minor, E.B. (the victim will be referred to by her initials), in North Carolina. According to the victim, she and Defendant, whom she knew as "Jason," had been communicating via telephone and computer for approximately two years. During the latter part of these two years, the victim sent Defendant numerous pictures of herself in various states of undress and engaging in masturbation.

The victim provided Sergeant Jackson with three photographs Defendant had sent her of himself, a list of screen names and email addresses he had used, and his home telephone number. After receiving consent from the victim's parents, Sergeant Jackson took the victim's computer to the North Carolina State Bureau of Investigation so that it could undergo a forensic investigation. Special Agent Gary R. Cullop received the computer from Sergeant Jackson and performed the forensic investigation. Special Agent Cullop testified that he requested several administrative subpoenas be issued to America OnLine (AOL) and BellSouth in order to determine the identity of the person with the screen names provided by the victim. The administrative subpoenas also requested information as to login dates and Internet Protocol (IP) addresses. The information received from the administrative subpoenas, as well as information provided by the victim, led to the confirmation of the identity of Defendant. Once Special Agent Cullop knew the name and address of the person who the victim had been corresponding with, he accessed the National Criminal Information Network through this network, and he obtained a copy of Defendant's driver's license. Special Agent Cullop then contacted the Tennessee Bureau of Investigation and spoke with Special Agent Tom Davis. After speaking with Special Agent Davis and determining that there was likely evidence on Defendant's computer that violated Tennessee law, Special Agent Cullop faxed a statement of the facts of the case to Special Agent Davis. Special Agent Cullop then contacted Special Agent Joe Craig who was located in Dickson County in order to determine if he was familiar with the area and knew where Defendant lived. Special Agent Cullop testified that he also sent copies of the victim's computer hard drive to Investigator Buddy Tidwell of the Dickson County District Attorney's Office.

Special Agent Craig testified that he was first contacted by Special Agent Davis regarding Defendant. Davis gave Craig the statement from Cullop along with the copies of the administrative subpoenas and phone records. Craig then contacted Cullop and determined that they were looking for chat logs with the victim and images from Defendant's computer. Craig then contacted

Investigator Buddy Tidwell for his assistance in the forensic examination of the computer, as well as two sheriff's deputies and two police officers to assist in the search. Craig testified that they determined the residence belonged to Defendant because of the phone and IP records and because his photograph on his driver's license matched one found on the hard drive of the victim's computer. Defendant's home was located in Dickson County and prior to obtaining the search warrant, Special Agent Craig drove by the residence. Once Craig obtained the search warrant, he, Investigator Tidwell, two uniformed officers, and two sheriff's deputies went to Defendant's house. The officers served the search warrant and seized Defendant's computer, several floppy disks, cameras, and other items.

Investigator Tidwell performed the forensic examination on the computer. He testified that all the images listed in the indictment were accessed by Defendant's computer the day before the search warrant was served and Defendant was arrested. Investigator Tidwell also testified that some of the images listed in the indictment were saved to floppy disks recovered from Defendant's home. Investigator Tidwell recovered numerous chat logs from Defendant's computer. The chat logs consisted of conversations between the victim and Defendant. Investigator Tidwell was able to determine that, during the chats, the victim had sent some photographs, although he was unable to determine what photographs she sent. By examining the computers, Investigator Tidwell was able to determine the creation dates (when they were created by the victim) of the images at issue.

The victim's mother Teresa Burton testified that her daughter began chatting on the internet with Defendant shortly after they moved from West Virginia to North Carolina. Ms. Burton testified that she listened in on phone calls between Defendant and her daughter and believed Defendant to be sixteen years old. The victim was thirteen when these conversations began. In the summer of 2004, the victim became withdrawn and disturbed. In September of 2004, the victim told her mother about the conversations she had been having with Defendant and the fact that she had discovered that Defendant was in his fifties, not sixteen as she believed. Ms. Burton later saw the images the victim had sent to Defendant. Ms. Burton and her husband then decided to call the FBI and it was decided to have the victim e-mail Defendant telling him she would not be able to talk to him for four to six weeks.

The victim testified that she and Defendant began chatting online in May or June of 2002 when she logged into a chat room and said that she was thirteen years old and bored. Defendant told her he was sixteen years old. The victim stated the conversations began with them talking about general things, like her family's move to North Carolina, school, and animals. The romantic relationship between Defendant and the victim began in May of 2003. The victim stated that she was in love with Defendant and that Defendant told her that he loved her. When the victim was fifteen the relationship turned sexual. Although she and Defendant never physically met, they had numerous sexual conversations both online and on the telephone. The victim also sent Defendant pictures of herself engaging in masturbation as well as pictures of her vagina, her bra, and her breasts.

The victim testified that the sexual conversations began with Defendant inquiring about her sexual history. She stated that he wanted to know what sexual activities she had engaged in and with whom. She also stated that Defendant was very controlling and wanted her to report her daily activities to him. She stated that she and Defendant would role play in their sexual conversations and his favorite was to pretend he was her father and that their sexual relationship was incestuous.

The victim also downloaded child pornography and sent it to Defendant. Defendant would ask the victim to mimic certain pictures and send them to him, which she did. In July of 2004, Defendant instructed the victim to take a picture of herself while inserting a hairbrush into her vagina. The victim testified that Defendant had sent her several pictures of girls inserting hairbrushes into their vaginas and told her that it was "sexy." Most of the photographs were made using a "pin camera" that Defendant told her to buy. In July of 2004, Defendant told the victim that he wanted "live shows" and sent her a web cam to attach to her computer. The victim stated that she performed sexual acts for Defendant via the web cam.

The victim learned Defendant's actual age in July or August of 2004. She was told that he was not the age he told her by Defendant's friend, Mark. When she confronted Defendant about his age, he became "upset." The victim testified that they spoke on the phone for an hour and Defendant was furious with her and threatened to tell her mother about the pictures she had sent him.

On cross-examination, the victim admitted that she had sent some of the pictures to Defendant without him clearly asking for them. However, she stated that she would never have sent any pictures without him asking her to and telling her what to send. She testified that he told her when you love someone you send these types of pictures to them.

The exhibits presented at trial consisted of chat logs between the victim and Defendant and several pictures of the victim's genitals, breasts, buttocks, and pictures of her masturbating.

ANALYSIS

On appeal, Defendant argues (1) that the trial court erred in failing to grant the motion to suppress the evidence seized from Defendant's home; (2) that the evidence was insufficient to sustain his convictions; (3) that the trial court erred in not requiring that all the counts of aggravated sexual exploitation of a minor be construed as one offense; (4) that the victim's testimony was not adequately corroborated; (5) that the trial court erred in refusing to grant the Defendant's motion to dismiss the indictments; (6) and that the law and facts do not support the sentence.

I. Motion to Suppress

The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this court unless the evidence contained in the record preponderates against them. State v. Ross, 49 S.W.3d 833, 839 (Tenn. 2001). The trial court, as the trier of fact, is able to assess the credibility of the witnesses, determine the weight and value to be afforded the evidence and resolve

any conflicts in the evidence. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001). However, this court is not bound by the trial court's conclusions of law. State v. Simpson, 968 S.W.2d 776, 779 (Tenn. 1998). The application of the law to the facts found by the trial court are questions of law that this court reviews de novo. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000). The defendant has the burden of establishing that the evidence contained in the record preponderates against the findings of fact made by the trial court. Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Crim. App. 1975).

In the instant case, Defendant argues that his pre-trial motion to suppress should have been granted because the affidavit lacked the particularity requirement of the place to be searched, that there was no logical nexus between the statements given by the minor and the belief of the officers that evidence would be found in Defendant's home, that the information was stale by the time the search warrant was issued, and that the victim was an accomplice and therefore her credibility is subjected to a higher standard.

A. The Particularity of the Place to Be Searched

Defendant claims that the search warrant lacked probable cause because it did not specifically describe the premises to be searched. Our federal constitution requires a search warrant to "particularly [describe] the place to be searched." U.S. Const., amend. IV. The search warrant in the instant case describes with particularity the place to be searched. The search warrant lists the address as "4443 Highway 70 West, Dickson, Tennessee 37055." It also describes the home as a "whitish brick dwelling house with dark shutters and dark roof and being located on the south side of Highway 70, approximately 5.6 miles west of the intersection of Highway 70 and Weaver Drive. . . ." Further, Special Agent Craig testified that he examined utility and E911 information in order to determine where Defendant lived. Special Agent Craig then drove out to the location obtained by him and determined that 4443 Highway 70 West was, in fact, the residence of Defendant. In State v. Conaster, 958 S.W.2d 357 (Tenn. Crim. App. 1997), this Court determined that a warrant passes the Constitutional requirement of particularity if "it describes the place to be searched with such particularity that the searching officer may with reasonable effort ascertain and identify the intended place."(citing U.S. v. Gahagan, 865 F.2d 1490, 1496 (6th Cir.1989)). The search warrant adequately described the place to be searched. Accordingly, Defendant is not entitled to relief as to this issue.

B. The Nexus and Staleness Arguments

Defendant next contends that the search warrant lacked probable cause because the information contained in the affidavit was stale and the State failed to show that the items sought in the search warrant would likely be at the residence when the warrant was executed. To establish probable cause an affidavit must set forth facts from which a reasonable conclusion may be drawn that the evidence will be found in the place for which the warrant authorizes a search. State v. Vann, 976 S.W.2d 93, 105 (Tenn.1998); State v. Longstreet, 619 S.W.2d 97, 99 (Tenn 1981). In addition, the affidavit must contain information which will allow a magistrate to determine whether the facts

are too stale to establish probable cause at the time issuance of the warrant is sought. Vann, 976 S.W.2d at 105. While the lapse of time between the commission of a crime and the issuance of a search warrant may affect the likelihood that incriminating evidence will be found, probable cause is a case-by-case determination. State v. Meeks, 876 S.W.2d 121, 124 (Tenn. Crim. App.1993). In making this determination, courts should consider whether the criminal activity under investigation was an isolated event or a protracted pattern of conduct. State v. Reid, 164 S.W.3d 286, 327 (Tenn. 2005). Courts also should consider the nature of the property sought, the normal inferences as to where a criminal would hide the evidence, and the perpetrator's opportunity to dispose of incriminating evidence. State v. Dellinger, 79 S.W.3d 458, 469-70 (Tenn.2002); State v. Smith, 868 S.W.2d 561, 572 (Tenn.1993).

Probable cause requirements are mandated by Article I, section 7 of the Tennessee Constitution. The facts which connect a crime or criminal activity to the premises to be searched are critical and must be included in an affidavit for a search warrant. Zurcher v. Stanford Daily, 436 U.S. 547, 556; State v. Baker, 625 S.W.2d 724, 726, *overruled on other grounds by* State v. Holt, 691 S.W.2d 520 (Tenn. 1984); see generally, 2 W.LaFave, Search and Seizure, § 3.7(d) (2d ed.1987 and Supp.1995). The affidavit must establish a nexus between the place of the search and the items sought to be found. The "type of crime, the nature of the items, and the normal inferences where a criminal would hide the evidence" may establish that connection. State v. Smith, 868 S.W.2d 561, 572 (Tenn.1993).

In the instant case, the search warrant contained "boiler plate" language regarding the use of computers in child pornography cases. The affidavit stated that those known to engage in the collecting of child pornography often use a computer to accomplish this. The affidavit also stated that people who obtain child pornography "tend to retain it for long periods of time." It is permissible under both our State and federal constitutions for an officer to make inferences such as these in order to connect the items sought to the crime and place to be searched. See generally Smith, 868 S.W.2d 561. The language in the affidavit also covered the general usage of a computer, storage devices like floppy disks, and the mobility of a computer.

The victim told Special Agent Cullop in North Carolina that she had sent Defendant numerous nude photographs of herself, including photographs of herself while masturbating, and had downloaded other pictures of child pornography for Defendant. This information was passed on to Special Agent Craig and was included in the affidavit for the search warrant. In its order, the trial court noted that floppy disks are used for storage and that someone who has made the effort to obtain child pornography would "very likely" retain it rather than erase it after viewing. The trial court also noted that a computer is "one of those items which one takes with him when he moves." Therefore, regardless of where Defendant and the victim initiated their relationship the photographs would still be on his computer. Further, the crimes alleged to have been committed by Defendant occurred over a period of two years. This was laid out in the affidavit and was based on information given to authorities by the victim. The victim told Cullop that she had spoken online and on the telephone with Defendant for about two years and that during these two years she had had sexually explicit conversations with him and had sent the images at issue. The fact that the relationship ended

in mid-September 2004 and the search warrant was not issued until mid-October 2004, does not automatically mean the information contained in the warrant was stale. As the affidavit stated, those who collect child pornography are likely to keep it for extended periods of time and even if a person believes he has deleted something from his computer, without use of a special type of software it is unlikely that the image was actually destroyed. Each of these inferences creates the requisite probable cause to support the denial of the suppression motion. See Reid, 164 S.W.3d at 327-28. Therefore, Defendant is not entitled to relief as to this issue.

C. The Victim as a Member of the Criminal Milieu

Lastly, Defendant argues that the evidence should have been suppressed because the victim was a member of the "criminal milieu" and, therefore, the information she gave to support probable cause should have been subjected to the higher standard of Jacumin and Aguillar/Spinelli. In situations where the information that the warrant is based on comes from a member of the criminal milieu, the affiant is required to show the basis of the informant's knowledge and establish that the informant is credible or that the information given is reliable. See State v. Jacumin, 778 S.W.2d 430 (Tenn 1989); Aguillar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584 (1969).

Assuming arguendo, that the victim was an accomplice in this case and is thereby a member of the "criminal milieu" and her information is then subjected to the higher standard of Aguillar/Spinelli, the search warrant is still valid. The requirements of Aguillar/Spinelli were met in the instant case because the basis for her knowledge was adequately set forth because she admitted to sending the pictures to "Jason," the person later identified as Defendant. She also provided the law enforcement officials with three photos of Defendant that he had sent to her, as well as the screen names they both used. Thus, the first prong of Aguillar/Spinelli is satisfied.

The second prong of the test is the credibility of the informant or the reliability of the information given. In the instant case, the victim stated that she had sent pictures to "Jason" at various screen names and the law enforcement officials were able to determine through administrative subpoenas that "Jason" was in fact Defendant. The victim described the pictures she sent and law enforcement officials found those pictures on her computer. The victim also provided pictures of "Jason" and the agents were able to determine that these pictures matched the driver's license photograph of Defendant. This all occurred before the search warrant was applied for, and all of the information was included in the affidavit. Thus, the information was proved reliable and Aguillar/Spinelli was satisfied. Defendant is not entitled to relief as to this issue.

II. Sufficiency of the Evidence

Defendant contends that the evidence was insufficient to sustain his convictions. Defendant makes no argument as to the sufficiency of the evidence to convict him of solicitation of a minor. However, after reviewing the record, we determine there is sufficient evidence to sustain this

conviction. Defendant's arguments center around his twenty-one convictions for especially aggravated sexual exploitation of a minor.

When a defendant challenges the sufficiency of the evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed.2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

At the time of the offenses, especially aggravated sexual exploitation of a minor was codified in Tennessee Code Annotated section 39-17-1005(a) (2003) as:

> It is unlawful for a person to knowingly **promote**, employ, use, assist, transport, or permit a minor to participate in the performance or in the production of material which includes the minor engaging in:
>
> (1) Sexual activity; or
>
> (2) Simulated sexual activity that is patently offensive. (emphasis added)

"Promote" is defined as meaning "to finance, produce, **direct**, manufacture, issue, publish, exhibit, or advertise. T.C.A. § 39-17-1002(5) (emphasis added). The definition of "sexual activity" includes all of the following acts:

> (A) Vaginal, anal or oral intercourse, whether done alone or with another human or an animal;
>
> (B) Masturbation, whether done alone or with another human or an animal;
>
> (C) Patently offensive, as determined by contemporary community standards, physical contact with or touching of a person's clothed or unclothed genitals, pubic area, buttocks or breasts in an act of apparent sexual stimulation or sexual abuse;

(D) Sado-masochistic abuse including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person;

(E) The insertion of any part of a person's body or of any object into another person's anus or vagina, except when done as a part of a recognized medical procedure by a licensed professional;

(F) Patently offensive, as determined by contemporary community standards, conduct, representation, depictions or descriptions of excretory functions; or

(G) Lascivious exhibition of the female breast or the genitals or pubic area of any person.

T.C.A. § 39-17-1002 (2003).

In this case, Defendant was convicted of twenty-one counts of especially aggravated sexual exploitation of a minor. The trial court then merged several of these counts into three counts and left three counts to stand alone based on the dates that the photographs were created. The trial court merged Counts 3, 4, 13, 14, 17, 18, and 20, occurring on July 23, 2004, with Count 2. Counts 8, 10, 15, 16, 21, 23, and 24 occurred on July 13, 2004, and were merged with Count 7. Count 12 occurred on July 25, 2004, and was merged with count 11. Counts 9, 19, and 22 were left as individual convictions because they were found to have occurred on separate dates. We have examined the photographs in Counts 2, 7, 9, 11, 19, and 22 , which depict the victim's breasts, genitals, buttocks, and her masturbating with her fingers and a hairbrush. It is clear that they contain images of sexual activity or simulated sexual activity and support convictions for sexual exploitation of a minor. We must then determine if Defendant "knowingly promote[d] . . . a minor to participate in the . . . production of [the] material . . ." T.C.A. § 39-17-1005(a).

Defendant argues that the evidence was insufficient to support his convictions for especially aggravated sexual exploitation of a minor because the evidence lacked proof that he "promote[d], employ[ed], use[d], assist[ed], transport[ed], or permit[ted]" the victim's production of the material. We disagree. At trial, the victim testified that Defendant often asked for photographs of her in various positions, using various items to masturbate. She testified that he would tell her to insert vegetables or fruits into her vagina and take pictures of the act and send them to him. During one conversation, Defendant told the victim, "[I] want a pic of that hairbrush in [y]our pussy." While the chat log does not show the picture that was sent, it does reflect that a photograph was sent. Defendant then states, "cool . . .put in your pussy . . .and turn it on for the next pic ok?" Once again the chat log reflects that a picture was sent. This conversation occurred on July 23, 2004, which is the date the jury found to have been the date the hairbrush image (Count 2) was produced. Further, during another conversation, Defendant told the victim to send him a picture of her breasts out of her bra, which is reflected in Count 9. At trial, the victim specifically testified that Defendant instructed her on how to pose for the photograph. Although the record does not clearly show that

Defendant asked for each photograph that the victim sent, it does show that he manipulated her into sending all of them. The proof demonstrates that Defendant spent a significant amount of time building an online relationship with the victim. The victim testified that she and Defendant, whom she believed to be 16, eventually confessed their love to one another and that Defendant told her that she could trust him. She stated Defendant was very controlling, and he told her that "people in love they will do anything for each other and that includes sending these pictures." The victim testified that she would never have sent any pictures without him asking and telling her what to send. A majority of the photographs were made with a "pin camera" that Defendant had instructed her to buy. This circumstantial evidence is sufficient to prove that Defendant promoted the victim's production of the photographs.

We conclude that the evidence is sufficient such that a reasonable trier of fact could have found Defendant guilty of especially aggravated sexual exploitation of a child in Counts 2, 7, 9, 11, 19, and 22.

III. Multiplicity of Offenses

Defendant argues that the knowing promotion of a minor to produce sexually explicit photographs in violation of Tennessee Code Annotated section 39-17-1005, as it existed during the relevant time period, constitutes only one offense and, therefore, multiple convictions violate the doctrine of multiplicity.

"Multiplicity concerns the division of conduct into discrete offenses, creating several offenses out of a single offense." State v. Phillips, 924 S.W.2d 662, 665 (Tenn. 1996). In determining whether offenses are multiplicitous, the reviewing court should consider the following general principles:

> 1. [a] single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution;
>
> 2. [i]f each offense charged requires proof of a fact not required in proving the other, the offenses are not multiplicitous; and
>
> 3. [w]here time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act.

Id. (footnotes omitted).

"'Additional factors such as the nature of the act; the time elapsed between the alleged conduct; the intent of the accused, i.e., was a new intent formed; and cumulative punishment may be considered for guidance in determining whether the multiple convictions violate double jeopardy.'" State v. Pickett, 211 S.W.3d 696, 706 (Tenn. 2007) (quoting State v. Epps, 989 S.W.2d 742, 745 (Tenn. Crim. App. 1998)).

"The legislature has the power to create multiple 'units of prosecution' within a single statutory offense, but it must do so clearly and without ambiguity." State v. Lewis, 958 S.W.2d 736, 739 (Tenn. 1997). "Should the legislature fail in this duty, the ambiguity will be resolved in favor of lenity." Id. (citing State v. Davis, 654 S.W.2d 688, 696 (Tenn. Crim. App. 1983)).

In Pickett, the defendant was convicted of eleven counts of sexual exploitation of a minor in violation of Tennessee Code Annotated section 39-17-1003 (2003). The evidence presented at trial showed that one of the defendant's friends alerted police officers that he had discovered, on the defendant's computer, digital images of children engaged in sexual activity. The defendant's computer was seized pursuant to a search warrant, and a forensic examination of the hard drive revealed numerous images of child pornography stored in the computer's temporary internet file and in the computer's unallocated space. Pickett, 211 S.W.3d at 699-700. Our supreme court concluded that the State had failed to establish that the legislature intended cumulative punishment. Id. at 706. Accordingly, "the evidence established only one offense and . . . the charges against [the defendant] were, therefore, multiplicitous." Id.

In the case of State v. Michael T. Sharp, No. E2006-00638-CCA-R3-CD, 2007 WL 4355466 at *7-8 (Tenn. Crim. App. at Knoxville, Dec. 13, 2007), no. perm to app. filed., the defendant was convicted of two counts of sexual exploitation of a minor and sentenced to two years for each count to be served consecutively. Through testimony at trial, the evidence showed that the defendant had downloaded over 800 images of child pornography, and that the downloads occurred on several different dates. Despite these different download dates, this Court concluded under Pickett that the defendant could only be convicted of one count of sexual exploitation of a minor.

Defendant relies on State v. John Ray Thompson, No. 2002-00487-CCA-R3-CD, M2003-01824-CCA-R3-CD, 2004 WL 2964704, *17 (Tenn. Crim. App., at Nashville, Dec. 20, 2004), no perm. app. filed, which involved the consolidation of two trials, in support of his argument that multiple units of prosecution, under the statue for which he was convicted, were not allowed for each image found in his possession. In Thompson, the defendant was convicted of one count of sexual exploitation of a minor, among other offenses, in the first case based on his possession of images found in his shed and photographs on the hard drive of his computer. The defendant was convicted of one count of especially aggravated sexual exploitation of a minor in the second case based on his action of photographing the victims engaging in or simulating sexual activity. On appeal, the defendant argued that the State had failed to elect which photograph or image it was relying upon to support his convictions. Id. This Court held that election was not necessary because the State obtained just one conviction for sexual exploitation of a minor based on the defendant's conduct in possessing all of the images in the shed and on the hard drive. Likewise, the State sought only one conviction of especially aggravated sexual exploitation of a minor for the defendant's action of taking pictures of the victims. Id. at *18.

In the present case, the State was not required to elect the facts as the basis for Defendant's especially aggravated sexual exploitation of a minor convictions since he was charged with 23 counts rather than one offense. See State v. Brown, 992 S.W.2d 389, 391 (Tenn. 1999). Here, the issue is

whether the application of the merger doctrine is required. The defendants in Pickett and Sharpe were convicted of sexual exploitation of a minor, which at the time of the offenses in each case did not clearly fix a punishment for possession of each photograph within a single transaction. Possession of all the photographs constituted one crime since they were all possessed at the same time. Defendant in this case was convicted of especially aggravated exploitation of a minor, which here has the added element of promoting a minor to participate in the production of the material. See T.C.A. § 39-17-1005(a). The jury found that the promoting occurred, and the photographs were created on different dates. The trial court then cured any problems with multiplicity by merging the counts that occurred on the same date. The court merged Counts 3, 4, 13, 14, 17, 18, and 20, occurring on July 23, 2004, with Count 2. Counts 8, 10, 15, 16, 21, 23, and 24 occurred on July 13, 2004, and were merged with Count 7. Count 12 occurred on July 25, 2004, and was merged with count 11. Counts 9, 19, and 22 were left as individual convictions because they were found to have occurred on separate dates.

We conclude that the six convictions for especially aggravated sexual exploitation of a minor fully comply with the principle set forth in Pickett permitting multiple convictions "if each offense requires proof of a fact not required in proving the other," which in this case is the date of the offense, and "where time and location separate and distinguish the commission of the offenses." Pickett, 211 S.W.3d at 705-06. The trial court properly merged Defendant's twenty-three convictions for especially aggravated sexual exploitation of a minor into six offenses that occurred on separate dates between July 13 and 24, 2004, as found by the jury.

IV. The Corroboration of the Victim's Testimony

Defendant next argues that E.B.'s testimony was not adequately corroborated. In Tennessee, it is well-settled that a defendant cannot be convicted on the uncorroborated testimony of an accomplice. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994); State v. Heflin, 15 S.W.3d 519, 524 (Tenn. Crim. App. 1999). Although the rule that the victim of a sex crime might, under certain circumstances, be an accomplice has been criticized, see, State v. Jeffrey Edward Pitts, No. 01C01-9701-CC-00003, 1999 WL 144744 (Tenn. Crim. App. at Nashville, March 18, 1999), such a rule appears to remain the law. We do note that the legislature has determined that victims of such crimes under the age of thirteen may not be considered accomplices:

> If the alleged victim of a sexual penetration or sexual contact within the meaning of § 39-13-501 is less than thirteen (13) years of age, such victim shall, regardless of consent, not be considered to be an accomplice to such sexual penetration or sexual contact, and no corroboration of such alleged victim's testimony shall be required to secure a conviction if corroboration is necessary solely because the alleged victim consented. Tenn. Code Ann. § 40-17-121.

However, the legislature has not extended this rule to minor victims of sex crimes, such as the victim in this case, who are between thirteen and seventeen years of age. State v. Ballinger, 93 S.W.3d 881 (Tenn. Crim. App. 2001). Further, this court has held that a child can be an accomplice in a sex-

related case. State v. Griffis, 964 S.W.2d 577, 588 (Tenn.Crim.App.1997) (citations omitted); State v. McKnight, 900 S.W.2d 36, 49 (Tenn. Crim. App. 1994); State v. Dickerson, 789 S.W.2d 566, 568 (Tenn.Crim.App.1990). Therefore, when a child is deemed an accomplice, the testimony of the child, like an adult, must be corroborated. Griffis, 964 S.W.2d at 588.

An accomplice is defined as a person who knowingly, voluntarily and with common intent unites with the principal offender in the commission of the crime. State v. Anderson, 985 S.W.2d 9, 16 (Tenn. Crim. App. 1997) (citing State v. Perkinson, 867 S.W.2d 1, 7 (Tenn. Crim. App. 1992)). When it is clear and undisputed that the witness participated in the crime, the trial court decides as a question of law whether he or she is an accomplice. Id. The question becomes one of fact for the jury to decide when the facts are in dispute or susceptible to different inferences. Id. In other words, where a witness denies involvement in the crime, the question of whether he or she is an accomplice is one of fact to be submitted to the jury with proper instructions from the court on how to consider such testimony. Anderson, 985 S.W.2d at 16 (citing Ripley v. State, 189 Tenn. 681, 687, 227 S.W.2d 26, 28 (1950)).

In the instant case, the victim was found to be an accomplice by the trial court. The victim took pictures of herself (a minor) while masturbating and sent them to Defendant. Because of this behavior, E.B. could be charged with violating sections 39-17-1003, -1005 in that she possessed and promoted photographs of a minor (herself) while engaging in sexual activity. As an accomplice, the victim's testimony must be corroborated, because uncorroborated testimony of an accomplice-witness will not support a conviction. State v. Bane, 57 S.W.3d 411, 419 (Tenn. 2001). Corroborating evidence is evidence, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference not only that a crime has been committed but also that the defendant was implicated in it. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). The independent corroborative testimony must include some fact or circumstance that affects the defendant's identity. Id. In the instant case, there was ample evidence to corroborate the victim's testimony. The victim testified that she was directed by Defendant as to what kinds of photographs to take and the State introduced a chat log in which Defendant was instructing the victim to take a photograph of herself while masturbating with a hairbrush. There was also evidence presented by Investigator Tidwell that these photographs were found in Defendant's possession. We conclude based on the chat logs, the investigation of Defendant's computer, and the photographs found on the victim's computer that there was adequate corroboration of her testimony. Accordingly, Defendant is not entitled to relief as to this issue.

V. Denial of the Motion to Dismiss the Indictments

Defendant argues that the trial court erred in refusing to dismiss the indictments based on a material variance from the proof presented to the grand jury and the proof presented at trial. Defendant claims that the prosecutor admitted that the grand jury was given over 100 photographs and that he did not know which photographs they used as a basis for the indictments against Defendant. The prosecutor also stated that he went through the photographs and chose twenty-three to correspond to the twenty-three counts on which the grand jury indicted Defendant.

An indictment must "state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended." T.C.A. § 40-13-202. To satisfy our constitutional notice requirements, "an indictment . . . must provide notice of the offense charged, an adequate basis for the entry of a proper judgment, and suitable protection against double jeopardy." State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996), *overruled on other grounds by* State v. Burns, 6 S.W.3d 453 (Tenn. 1999); see also State v. Tate, 912 S.W.2d 785, 788-89 (Tenn. Crim. App. 1995). "As a general rule, it is sufficient to state the offense charged in the words of the statute, or words which are equivalent to the words contained in the statute." Tate, 912 S.W.2d at 789 (citations omitted). An indictment which fails to allege the elements of the offense in the terms of the statute will still be sufficient "if the elements are necessarily implied from the [factual] allegations made." State v. Marshall, 870 S.W.2d 532, 538 (Tenn. Crim. App. 1993) (citing Hagner v. United States, 285 U.S. 427, 430, 52 S. Ct. 417, 419, 76 L. Ed. 861 (1932)).

In the instant case, the indictment originally limited the time of the offenses from July 1, 2004-September 31, 2004. The incorrect ending date was amended at trial to reflect a date of September 30, 2004. The fact that the indictment limited the dates protected Defendant from double jeopardy. Once the trial began, Defendant could not be prosecuted for any other photographs created in this time period. Further, the language of the indictment clearly informed Defendant of what he was being charged with in that it quoted Tennessee Code Annotated section 39-17-1005. Accordingly, Defendant is not entitled to relief as to this issue.

VI. Sentencing

Defendant's final arguments center around his sentence. The trial court sentenced Defendant to an effective 22-year sentence as a Range I offender for his solicitation of a minor and especially aggravated sexual exploitation of a minor convictions. The trial court found that enhancement factor (2) based on Defendant's previous history of criminal behavior was applicable. Tenn. Code Ann. § 40-35-114(2)(2003). The trial court also found enhancement factor (8) applicable in that the offense involved a victim and was committed to gratify Defendant's desire for pleasure or excitement. Tenn. Code Ann. § 40-35-114(8)(2003). Defendant argues that the trial court should not have imposed consecutive sentencing because there was no sexual abuse of the victim and that he should have been granted alternative sentencing.

We note that the legislature has recently amended several provisions of the Sentencing Reform Act of 1989, which became effective June 7, 2005. However, although Defendant was sentenced after the effective date of the amended Act, Defendant's crimes in this case occurred prior to June 7, 2005, and it does not appear that Defendant elected to be sentenced under the provisions of the amended Act by executing a waiver of his ex post facto protections. See 2005 Tenn. Pub. Acts ch. 353§ 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

A defendant who challenges his or her sentence has the burden of showing the sentence imposed by the trial court is improper. T.C.A. § 40-35-401 (2003), Sentencing Commission Comments; State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). It is this court's duty to conduct a de novo review of the record with a presumption the trial court's determinations are correct when a defendant appeals the length, range, or manner of service of his or her sentence. T.C.A. § 40-35-401(d). The presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999).

A. Length of sentence/Effect of Gomez II

Although not raised on appeal, we observe that the trial court's application of enhancement factors (2) , based on Defendant's history of criminal behavior, and (8), the offense was committed to gratify Defendant's desire for pleasure or excitement, to enhance Defendant's sentence for solicitation of a minor and twenty-one counts of especially aggravated sexual exploitation of a minor is problematic in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

At the time of the offenses, Tennessee Code Annotated section 40-35-210(c), (d) provided:

> (c) The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors.
>
> (d) Should there be enhancement but no mitigating factors for a Class B, C, D, or E felony then the court may set the sentence above the minimum in that range but still within the range.

As a Range I standard offender convicted of especially aggravated sexual exploitation of a child, a Class B felony, Defendant is subject to a sentence of between eight and twelve years. T.C.A. § 40-35-112(a)(2). The presumptive sentence for Defendant is eight years. As a Range I standard offender convicted of sexual exploitation of a minor and solicitation of a minor, both Class E felonies, Defendant is subject to a sentence of between one and two years. Id. § 40-35-112(a)(5). The presumptive sentence is the minimum sentence of one year.

In Blakely v. Washington, the United States Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000). The Apprendi court noted that nothing "suggests that it is impermissible for judges to exercise discretion - taking into consideration various factors relating both to offense and offender - in imposing a judgment within the range prescribed by statute." Apprendi, 530 U.S. at 481, 120 S. Ct. at 2358. In a later case the Supreme Court held, "if a State makes an increase in a defendant's authorized punishment contingent on a

finding of fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602, 122 S. Ct. 2428, 2439, 153 L. Ed. 2d 556 (2002).

In Blakely, the Supreme Court defined the terminology of the "statutory maximum" as applied in Apprendi. The Court clarified that the statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Blakely, 524 U.S. at 302, 124 S. Ct. at 2537. The Supreme Court again restated this holding in Cunningham v. California, 549 U.S. 278, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007).

In Cunningham, California's sentencing scheme (known as DSL, determinate sentencing law) provided for three precise terms of imprisonment - lower, middle, and upper. The defendant in that case was sentenced to the upper term after the trial court found aggravating circumstances. The California Penal Code controlled the judge's choice and provided that "the court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation of the crime." Cal. Penal Code § 1170(b) (West Supp. 2006). The circumstance in aggravation only needed to be established by a preponderance of the evidence. Cunningham, 549 U.S. at 288, 127 S. Ct. at 868. The Supreme Court held, "[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt . . . the DSL violates Apprendi's bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Id. (citing Apprendi, 530 U.S. at 490, 120 S. Ct. at 2348).

In Gomez II, our supreme court reviewed the defendants' sentencing claims under plain error analysis. Gomez, 239 S.W.3d 733, 737 (Tenn. 2007). Rule 52 of the Tennessee Rules of Criminal Procedure provides that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in a motion for new trial or assigned as error on appeal." Relief is granted under plain error review "only where five prerequisites are met: (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is "necessary to do substantial justice." Id. (quoting State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)).

In the instant case, the record clearly establishes what occurred in the trial court in determining the length of Defendant's sentences, and thus the first prerequisite is met. In Gomez II, our supreme court concluded that "the trial court's application of the two other enhancement factors [not based on the defendants' prior convictions] breached a clear and unequivocal rule of law" in light of Cunningham. Gomez II, 239 S.W.3d. at 740-41. The trial court's determination, in this case, that enhancement factors (2) and (8) were applicable to increase Defendant's sentences

deprived him of the Sixth Amendment right to have a jury determine whether the enhancement factors applied and, thus, a substantial right of the accused was adversely affected. See Id. At the time of Defendant's sentencing hearing, Gomez I, 163 S.W.3d 632 (Tenn. 2005), which concluded that Tennessee's sentencing structure did not violate Sixth Amendment principles, was controlling precedent. Therefore, it cannot be said that Defendant waived his Sixth Amendment claim for tactical reasons. See Id. Finally, Defendant's sentences were enhanced based on a factor other than the existence of a prior criminal record. Consideration of the error is required to do substantial justice. Therefore, we conclude that Blakely and Cunningham preclude the application of the enhancement factor in Tennessee Code Annotated section 40-35-114(8) unless it has been found by a jury. While neither Blakely nor Cunningham forbid the enhancement of a sentence due to prior convictions, Defendant does not have a record of prior convictions. For the foregoing reasons, we reduce each of Defendant's sentences to the statutory presumptive sentence. The sentence for especially aggravated sexual exploitation of minor is reduced to eight years for each count and the sentence for solicitation of a minor is reduced to one year.

B. Consecutive Sentencing

Generally, it is within the discretion of the trial court to impose consecutive sentences if it finds by a preponderance of the evidence that at least one of following statutory criteria apply:

> (1) [t]he defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) [t]he defendant is an offender whose record of criminal activity is extensive;
>
> (3) [t]he defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) [t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) [t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and

> the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) [t]he defendant is sentenced for an offense committed while on probation; or
>
> (7) [t]he defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b).

In the instant case, the trial court determined that subsection five applied to Defendant and justified consecutive sentencing. The trial court stated, ". . . there are obviously numerous convictions here. Also two or more of these offenses involve sexual abuse of a minor; and I do find that this activity would fit within the definition under the sentencing of sexual abuse . . . ." Defendant argues that this is not an appropriate reason for ordering Counts 2 and 7 to be served consecutively because there was no sexual abuse.

The State contends that sexual exploitation of a minor does constitute abuse and relies upon a Vermont civil case, TBH by and through Howard v. Myer, 716 A.2d 31 (Vt. 1998). In that case, the defendant, a close family friend, took nude photographs and video of two minor girls while the girls were in the defendant's jacuzzi. He was convicted of two counts of the use of a child in a sexual performance. One of the victims, T.B.H., later filed a civil suit against the defendant. The Vermont Supreme Court determined that the defendant's sexual exploitation of the victim was not covered under the defendant's homeowner's or personal catastrophe policies, and the insurance company had no duty to defend the defendant or indemnify his sexual misconduct based on Vermont's inferred intent rule. In the opinion, the Court noted that Blacks' Law Dictionary 217 (5th ed. 1979) defines child abuse as "[a]ny form of cruelty to a child's physical, moral, or mental well-being." The Court further held that "sexual exploitation of a child, in violation of 13 V.S.A. § 2822(a), is sexual abuse of a minor for purposes of the inferred-intent rule." TBH by and through Howard, 716 A.2d at 34. An extensive search of Tennessee case law has revealed neither a case on this specific issue nor a definition of "sexual abuse" in the definitions of the criminal acts context. Although this Court is left without a clear statutory definition of "sexual abuse" in the criminal context, the definition of child sexual abuse under Tennessee Code Annotated section 37-1-602(3)(B) (emphasis added), which covers juvenile courts and proceedings, reads as follows:

> "Child sexual abuse" also means the commission of any act involving the unlawful sexual abuse, molestation, fondling or carnal knowledge of a child under thirteen (13) years of age that on or after November 1, 1989, constituted the criminal offense of:
>
> (I) Aggravated rape under § 39-13-502;
>
> (ii) Aggravated sexual battery under § 39-13-504;

(iii) Aggravated sexual exploitation of a minor under § 39-17-1004; or

(iv) Criminal attempt as provided in § 39-12-101 for any of the offenses listed above;

(v) **Especially aggravated sexual exploitation of a minor under § 39-17-1005.**

(vi) Incest under § 39-15-302;

(vii) Rape under § 39-13-503;

(viii) Sexual battery under § 39-13-505;

(ix) Sexual exploitation of a minor under § 39-17-1003 . . .

(emphasis added). Based on the above authority, we agree with the State that especially aggravated sexual exploitation of a minor does qualify as sexual abuse.

Now we must determine whether the trial court abused its discretion by ordering that some of Defendant's convictions run consecutively. The record shows that there were aggravating circumstances arising from the relationship between Defendant and the victim, and that there was a long period of undetected sexual activity. Defendant was in his fifties when he contacted the thirteen-year-old victim, and they began chatting online in May or June of 2002. A romantic relationship began in May of 2003. Defendant pretended to be sixteen years old, and he used several screen names and e-mail addresses. From this, it can be inferred that Defendant was planning and carrying out his criminal acts from his initial contact with the victim. When the victim was fifteen, the relationship turned sexual, and she and Defendant had numerous sexual conversations both online and by telephone. Defendant told the victim that he loved her and asked her to mimic certain pictures of child pornography and send them to him, and in July of 2004, he instructed the victim to take a photograph of herself while inserting a hairbrush into her vagina. The victim testified that Defendant told her when you love someone you send these types of pictures to them. At some point, Defendant instructed the victim to buy a "pin camera," and he also sent the victim a web cam to attach to her computer, and she performed sexual acts for him through the camera. There was testimony that Defendant threatened the victim when she learned his true age and attempted to end her relationship with him. Although there was no physical harm to the victim, evidence presented at the sentencing hearing indicated that the victim was afraid that Defendant would kill her or her family, she had nightmares, trouble sleeping, and stomach discomfort from her relationship with Defendant and the threats that he made when she attempted to end their relationship.

After a thorough review of the evidence from the sentencing hearing, the relevant statute, and case law, we conclude that consecutive sentences are authorized in this case and that the trial court did not abuse its discretion in ordering the sentences in Counts 2 and 7 to be served consecutively.

Defendant also argues that as an accomplice, E.B. could not also qualify as a victim as a basis for consecutive sentencing. However, this argument is without merit. In State v. McKnight, 900 S.W.2d 36, 47-49 (Tenn. Crim. App. 1994), this Court describes the minor victims of sexual offenses as both victims and accomplices. In particular, this court held that "[e]ach of these victims qualified as accomplices to these offense." Id. at 48.

C. Alternative Sentencing

Defendant contends that because consecutive sentencing is not appropriate in this case, the trial court should have granted his request for alternative sentencing, specifically his request for probation. An especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing in the absence of evidence to the contrary. T.C.A. § 40-35-102(6). The court should also examine the defendant's potential for rehabilitation or lack thereof when considering whether alternative sentencing is appropriate. T.C.A. § 40-35-103(5). Sentencing issues must be decided in light of the unique facts and circumstances of each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. T.C.A. § 40-35-103(2); State v. Batey, 35 S.W.3d 585, 588-89 (Tenn. Crim. App. 2000). Indeed, individualized punishment is the essence of alternative sentencing. State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). In summary, sentencing must be determined on a case-by-case basis, tailoring each sentence to that particular defendant based upon the facts of that case and the circumstances of that defendant. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986).

Because Defendant was convicted of a Class B felony, he is not entitled to the presumption that an alternative sentence is appropriate. See T.C.A. § 40-35-102(6). However, his sentence is set at eight years and, therefore, he is eligible for an alternative sentence. T.C.A. § 40-35-303(a) (2003). In State v. Kyte, 874 S.W.2d 631 (Tenn. Crim .App. 1993), this Court determined that "the ultimate burden of establishing suitability for probation, however, is still upon the defendant." citing T.C.A. § 40-35-303(b).

In the instant case, Defendant did not satisfy this burden. Aside from pointing out that Defendant does not have a criminal record, there is no other basis for the granting of probation. The conduct committed in this case by Defendant was serious. He and the thirteen-year-old victim began chatting online in May or June of 2002, and a serious romantic relationship began in May of 2003. Defendant pretended to be sixteen years old, and he used several screen names and e-mail addresses. When the victim was fifteen, the relationship turned sexual, and she and Defendant had numerous sexual conversations both online and by telephone. Defendant asked the victim to mimic certain pictures of child pornography and send them to him, and in July of 2004, he instructed the victim to take a photograph of herself while inserting a hairbrush into her vagina. Defendant also sent the victim a web cam to attach to her computer, and she performed sexual acts for him through the camera. There was testimony that Defendant threatened the victim when she learned his true age and attempted to end her relationship with him. There was also testimony at the sentencing hearing

by a T.B.I. agent that approximately twenty-five disks were seized from Defendant's home containing child pornography. The record does not contain any indication that Defendant accepted responsibility for his crimes or that he expressed any remorse. We conclude the trial court did not abuse its discretion in denying alternative sentencing.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed as to Counts 1, 2, 7, 9, 11, 19, and 22. In light of Gomez II, we remand Defendant's case to the trial court for entry of a corrected judgment reflecting his sentence for solicitation of a minor at one year, and his sentence for each conviction of especially aggravated exploitation of a minor at eight years. We affirm the trial court's determination that Counts 2 and 7 should be served consecutively.

_____
THOMAS T. WOODALL, JUDGE